

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBIN SHARP,
Petitioner,

v.

D.K. SISTO, Warden,
Respondent.

No. C 08-4503 MMC (PR)

ORDER OF DISMISSAL

On September 25, 2008, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee. For the reasons set forth below, the Court finds the petition is subject to dismissal because petitioner has not sought or obtained authorization to file a second or successive petition under 28 U.S.C. § 2244(b)(3).

BACKGROUND

In 1992, in the Superior Court of Sonoma County, petitioner was convicted of numerous felonies. He was sentenced to a term of 129 years in state prison. In 1994, the California Court of Appeal affirmed the convictions but remanded for resentencing. In 1995, on remand, the trial court resentenced petitioner to 111 years in state prison. Subsequently, petitioner filed state habeas corpus petitions challenging his convictions and sentence, all of which petitions were denied.

Thereafter, in 2001, petitioner filed in this district a habeas corpus petition challenging

1 his convictions and sentence. See Sharp v. Cary, C 01-3625 MMC (PR). On February 1,
2 2002, the Court granted respondent's motion to dismiss the petition as untimely and entered
3 judgment accordingly. See id. Docket Nos. 10 & 11. Subsequently, the Court denied
4 petitioner's motions for reconsideration and for a certificate of appealability. See id. Docket
5 Nos. 16 & 18. The Ninth Circuit also denied petitioner's request for a certificate of
6 appealability. See id. Docket No. 22.

7 By the instant petition, petitioner claims the trial court violated his Sixth Amendment
8 right to a jury trial by sentencing him in 1995 to an aggravated term on twenty-seven of the
9 charges of which he was found guilty. Petitioner bases his claim on Cunningham v.
10 California, 549 U.S. 270 (2007), in which the Supreme Court held that California's
11 determinate sentencing law violates the Sixth Amendment because it authorizes the judge,
12 not the jury, to find the facts permitting an upper-term sentence. Additionally, petitioner
13 claims the restitution fine imposed by the trial court was excessive, in violation of the Eighth
14 and Fourteenth Amendments.

15 DISCUSSION

16 Where a claim presented in a second or successive habeas corpus petition under
17 28 U.S.C. § 2254 has been presented in a prior petition, such claim must be dismissed.
18 28 U.S.C. § 2244(b)(1). Where a claim presented in a second or successive habeas corpus
19 petition under § 2254 has not been presented in a prior petition, such claim likewise must be
20 dismissed, unless: (1) the claim relies on a new rule of constitutional law, made retroactive to
21 cases on collateral review by the Supreme Court, or (2) the factual predicate for the claim
22 could not have been discovered previously through the exercise of due diligence, and the
23 facts underlying the claim would be sufficient to establish by clear and convincing evidence
24 that, but for constitutional error, no reasonable fact-finder would have found the petitioner
25 guilty of the underlying offense. Id. § 2244(b)(2). Before a second or successive habeas
26 petition may be filed in the district court, the petitioner must first obtain from the Court of
27 Appeals an order authorizing the district court to consider the petition. Id. § 2244(b)(3)(A).

28 The instant petition presents claims challenging the 1995 sentence that was the subject

1 of petitioner's prior federal habeas corpus petition. Consequently, petitioner may not
2 proceed with such claims until he has sought or obtained an order from the Ninth Circuit
3 Court of Appeals, authorizing him to file a second or successive petition in the district court.
4 Accordingly, the instant petition will be dismissed without prejudice to petitioner's refiling
5 the petition if he obtains the necessary order.


6 **CONCLUSION**

7 For the reasons stated above, the petition is hereby DISMISSED, pursuant to 28
8 U.S.C. § 2244(b) and without prejudice, as a second or second successive petition.

9 The Clerk shall close the file.

10 IT IS SO ORDERED.

11 DATED: October 21, 2008

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13 MAXINE M. CHESNEY
14 United States District Judge
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